IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-463

CHESTNUTT MANAGEMENT CORPORATION,
Petitioner,

v.

ELEANOR C. MILLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Introduction

Respondent's brief in opposition usefully demonstrates the importance of granting the writ to determine how rapidly four quick judicial acorns may be permitted, if at all, to expand to a wildly mutant forest where Congress has provided no soil.

Respondent's thesis is that any speculative disappointment if labeled "securities law" may through judicial invention *dis*-invent free speech and due process.

I.

Petitioner Has Been Punished for Free Speech Opinion and Deprived of Due Process.

Respondent's brief in opposition demonstrates that this case is a Scopes Trial of stock market opinion resulting in automatic punitive damage, as well as the Sedition Law of financial writing.

Respondent's quotations (Resp. br. 4, 5) from the 17th Edition of the 1952 Redbook (Ex. 5) and references throughout demonstrate that the book was put on trial with an automatic presumption of punitive damage for a declining stock market.

Respondent's quotation (Resp. br. 5-6) from and references to the weekly opinion (Ex. 3):

> "With two exceptions, for thirty-six consecutive weeks from July 31, 1969 to April 9, 1970, the Survey began its commentary with these precise words: 'the general market trend evidence continues bullish.' Moreover, from June 26, 1969 through April, 1970, the Trend Oscillograph registered plus or 'bullish' and from January, 1970 showed extremely 'bullish' figures." (footnotes omitted)

demonstrate that opinion was put to the test of orthodoxy to be determined by the jury, failure of which test of orthodoxy resulted in automatic presumption of punitive damage for a declining stock market.

Respondent does not quote from (but merely refers to, at pp. 4, 12) the ten-column article published in *Medical Economics* (Ex. 4, reprinted A1-A7) written by Philip

Harsham as Senior Editor of that professional journal, since the mere fact of being *written about* was deemed to constitute violation of law resulting in automatic presumption of punitive damage for a declining stock market.* This is directly what the trial judge charged in his words (A12) that under the Investment Advisers Act of 1940 that it was illegal to employ any:

> ". . . device or scheme or artifice directly or indirectly to defraud a client. These words include the publication or circulation of any advertisement which directly or indirectly refers to a testimonial of any kind concerning the investment adviser or concerning any advice analysis or report or other service rendered by the investment adviser."

As shown (Pet., p. 13), Miller argued the same illegality of the published article to the jury.

These words of the charge, followed by the judge's words (A13) with respect to ". . . opinion relevant to the conditions of the securities market", (quoted more fully Pet., p. 14) demonstrate again that the only thing tried in this case was opinion, especially in the light of the fact that nowhere in this record or in the judge's charge is there to be found even a reference to any security, or any transaction, or any historical fact—whether material or immaterial—which was either misstated or omitted.

The monumental importance of this case to financial opinion free speech is illustrated by a full page copyrighted

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* To treat a third party's magazine article as "fraud" is only slightly less surprising than to suggest that the "D minus" rating by *Forbes Magazine* of a different advisory client (American Investors Fund, Inc.—Complaint ¶2, Pet., p. 6) is fraudulent *per se*, as if a concert artist should be punished according to a critic's grading scale.

advertisement (*Wall Street Journal,* Oct. 5, 1978, p. 9) of Merrill Lynch, not simply depicting the bullish "Thundering Herd", but stating in the middle column:

> *"Market expectations by institutional investors and the public are now at minimal levels.* Stock Market history suggests that opportunities are often more attractive when expectations are low. In this respect, the 'signals' are favorable." (Emphasis in original).

Toward the foot of the same column, after reference to severe "depreciation" of the U.S. dollar is the sentence:

> "This heightens the attractiveness of equities to foreign investors."

To borrow the words of Merrill Lynch, Chestnutt correctly found the " 'signals' to be favorable" in Spring 1970 immediately before the advance to all time highs in stock prices.

Readers of the Merrill Lynch advertisement were invited to obtain a publication which ". . . tells why we believe this may be a time of historic opportunity", which copyrighted publication* (replete with graphs) states (p. 7, col. 1):

> ". . . a period of rising stock prices appears likely if only because that is not what investors in general expect at this time."

Whatever the "expectations" of investors at that time, in a few days it was appropriate for another Dow-Jones publication to publish under its own name on the Cover Page (*Barrons,* October 30, 1978):

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* Merrill Lynch Pierce Fenner & Smith, Inc., "Common Stocks—A Perspective" (Fall, 1978).

"The October Massacre

Index	*Oct. 13*	*Oct. 27*	*% Change*
Amex	170.79	141.31	— 17.3
Barron's Low-Priced	440.50	a344.00	— 21.9
Dow Jones Industrials	897.09	806.04	— 10.2
Indicator Digest	51.69	43.71	— 15.4
NASDAQ Composite	135.58	115.25	— 15.0
Value Line Composite	116.06	a100.58	— 13.3"

a—Index as of 10/26/78

The "October Massacre" transpired simultaneously with a 21% increase in 3rd quarter profits of 548 corporations. (*Wall Street Journal,* Oct. 30, 1978, p. 1, Col. 6).

The prior (October 23, 1978) week's cover page of *Barron's* referred to its first article:

"The Chartist Pope

See page 4

Graph Omitted

Europe's leading technician is bullish on U.S. stocks. Adriaan Schrikker also likes the dollar. Bonds: 'a legalized swindle.' "

At page 4 of an extensive interview with Mr. Schrikker the first question and answer reads:

> "Barrons: How did you come by the nickname 'Chartist Pope'?
>
> A. I suppose because I've been pushing technical analysis so much in the last 15 years. When I first started here in Europe, most people laughed at me. Technical analysis as such comes from the other side of the big pond and was completely new in Europe."

The Chief Justice concluded the First Amendment ". . . belongs to all who exercise its freedoms". *First National Bank* v. *Bellotti*, —— U.S. ——, 98 Sup. Ct. 1407, 1429 (1978).

If Chestnutt can be punished for his opinion, what is the liability of Merrill Lynch after a $100 billion decline in two weeks? Who owes what to whom, and how much?

II.

Respondent Cannot Carve Out Any State Ground.

Irrespective of Illinois common law, the Court has reminded us in *Gertz* v. *Robert Welsh, Inc.*, 418 U.S. 323, 339 (1974):

> "We begin with the common ground. Under the First Amendment there is no such thing as a false idea."

This Court held in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284 (1964):

> "The power to create presumptions is not a means of escape for constitutional restrictions."
>
> • • •
>
> "This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser* v. *Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed. 2d 1460. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see • • • whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp* v. *Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295; see also, *One, Inc.* v. *Olesen*, 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed.2d 352; *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352. We must 'make an independent examination of the whole record,' *Edwards* v. *South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."

Irrespective of Tripoli,* claimed Vermont citizenship by the California and New York international lawyer, or any other state "contacts", there was no contention that Connecticut did not follow the universal common law principle already expressed in a suit under the Advisers Act as to pendent common law by Judge Levet in *Jones Memorial Trust* v. *Tsai Investment Services*, 367 F.Supp. 491 (1973), upon which Chestnutt's proposed charges (A8-A10) were expressly based. Judge Levet decided (367 F.Supp. at 499) in the Southern District of New York:

> "In order for a prediction or promise to satisfy the requirement of misrepresentation of a material fact said prediction or promise must have been made with an intent not to comply therewith. *Sabo* v. *Delman*, 3 N.Y. 2d 155, 159-160 (1957). The contention that plaintiff has proved such intent is unsupported. No credible evidence indicates that defendant had the required intent."

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* Respondent Miller's receipt within 5 to 8 days of Chestnutt's current opinion renders ludicrous the pervasive syndrome in respondent's brief of Darkest Africa/Dr. Livingstone.

In the *Sabo* case, Judge Fuld had stated the universal common law rule (3 N.Y.2d at 159-160):

> "While 'Mere promissory statements as to what will be done in the future are not actionable' (*Adams* v. *Clark*, 239 N.Y. 403, 410, 146 N.E. 642, 644), it is settled that, if a promise was actually made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of 'a material existing fact' upon which an action for rescission may be predicated."

The "forbidden intrusion on the field of free expression" (*N.Y. Times, supra*) is quite evident, since neither respondent nor either court below ever identified any security or any transaction claimed to be fraudulent, nor pointed to any alleged misstatement or omission of any historical fact.*

Only a specific fraudulent transaction, alleged and proved with the "particularity" required by Rule 9(b), Fed.R. Civ.Pr., could amount to a "substantive evil" such as "fighting words" or "shouting fire" in a crowded theatre.

Here, the sole *corpus delicti* is published opinion itself, never heretofore a "substantive evil".

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* Since Chestnutt did not peddle real estate or sell anything to, or buy anything from respondent, it is understandable that respondent does not adopt Judge Timber's invocation (A25) of Pennsylvania backed up sewage (*Shore* v. *Hoffman*, 227 Pa.Super. 176, 324 A.2d 532 (1974)), District of Columbia real property surveys (*Isen* v. *Calvert Corp.*, 379 F.2d 126 (C.A.D.C., 1967)), title to whiskey in Salt Lake City (*Stein* v. *Treger*, 182 F.2d 696 (C.A.D.C., 1950)) or defense on a note for purchase of Kentucky bank stock (*Anderson* v. *Tway*, 143 F.2d 95 (6 Cir. 1944)).

III.

This Court Should Now Determine Whether the Advisers Act Provides for Money Damage.

Respondent's brief (p. 17) relies upon three divided circuits as to "implication".

Several months after the trial judge's charge herein (October 5, 1975), Mr. Justice Blackmun, dissenting, in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) regretted failure of the Court to go "beyond common law fraud" (at 217).

As pointed out in our petition (p. 15), the SEC has never through "available sanctions" or prospective equitable relief sought further disclosures in the Redbook or the weekly service. This Court listed seven separate securities by name, the *prices* of which might have been affected by the timing of transactions and recommendations, when the Court approved compelling future disclosure of the practice. *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 202 (1963).

Now, after 38 years, this present case after final money judgment is the fourth petition* to confront the Court in the few months since *Abrahamson* v. *Fleschner*, (2 Cir., 1977) 568 F.2d 862.

Further, since contrary to *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975) which barred suits for alleged "fraudulent" inducement not to buy or sell, this case

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* *Fleschner* v. *Abrahamson* (No. 77-1279), *cert. den.* May 15, 1978, two Justices noting their views that the writ should be granted.
Transamerica Mtg. Advisers v. *Lewis* (No. 77-1645).
First Houston Investment Corp. v. *Wilson* (No. 77-1717).

alleged and went to the jury (Pet., p. 7) for "recklessly" failing to make "short sales".

Our petition (p. 7) plagiarizes the reasons for granting the writ in *Fleschner* (No. 77-1279). Further, this case would appear to be a compelling one for the exercise of this Court's supervisory jurisdiction as to statutory construction.

CONCLUSION

For the reasons stated and incorporated in the Petition a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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